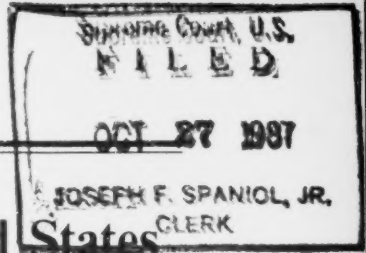


87-709

No. _____



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF WISCONSIN,

Respondent,

v.

THOMAS D. TRUDEAU,
TRUDEAU DEVELOPMENT, INC.,
TRUDEAU CONSTRUCTIONS, INC.,
SUPERIOR DEVELOPMENT, INC.

Petitioners.

and

THE ASHLAND COUNTY BOARD OF ADJUSTMENT,
LARRY HILDEBRANDT, ASHLAND COUNTY
ZONING ADMINISTRATOR.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF WISCONSIN

SAMUEL J. RECHT
(Counsel of Record)
DAVID L. PETERSEN
SUSAN LaCAVA
QUARLES & BRADY
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497
(414) 277-5000
Counsel for Petitioners

October 27, 1987

42-148

QUESTIONS PRESENTED

1. Can the State of Wisconsin take title to non-navigable wetlands under the public trust doctrine simply because the wetlands drain into water courses that, in turn, drain into a navigable lake?
2. Can a state abandon the common law governing ownership of the beds of water bodies, redefine the public trust boundary of a navigable lake, and claim title to land granted under a federal patent on the ground that it is inside the newly drawn boundary?
3. Can a state court invalidate a federal patent based on a record in which the state not only failed to prove that the land was ever submerged by a navigable lake but expressly refused to meet any standard of proof previously recognized by Wisconsin or this Court?
4. Did the Wisconsin Supreme Court deny petitioners due process by making findings that, "As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is part of Lake Superior;" and "The Court of Appeals did not err in finding that the site is part of a basin naturally connected to Lake Superior," based on a record wholly devoid of these facts?

(ii)

PARTIES TO THE PROCEEDING BELOW

In the proceeding before the Wisconsin Supreme Court, the appellants were Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Constructions, Inc., Superior Development, Inc., the Ashland County Board of Adjustment, and Larry Hildebrandt, Ashland County Zoning Administrator. Only Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Constructions, Inc., and Superior Development, Inc. are petitioners in this Court.

The appellee below, the State of Wisconsin, is the respondent in this Court.

RULE 28.1 LISTING

Trudeau Development, Inc., Trudeau Constructions, Inc., and Superior Development, Inc., have no parents, subsidiaries or affiliates.

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THE ASHLAND COUNTY BOARD OF ADJUSTMENT,
LARRY HILDEBRANDT, ASHLAND COUNTY
ZONING ADMINISTRATOR.

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF WISCONSIN**

The petitioners, Thomas D. Trudeau, Trudeau Development, Inc., Trudeau Constructions, Inc., and Superior Development, Inc., respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of Wisconsin entered in this proceeding.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 139 Wis. 2d 91 and is reprinted in Appendix A.¹

The opinion of the Wisconsin Court of Appeals, which is not officially reported, is reprinted in Appendix B.

The Memorandum Opinion and Order, Findings of Fact and Conclusions of Law, and Judgment of the Circuit Court of Ashland County are not officially reported. They are reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on June 11, 1987. App. A at 1a. A petition for rehearing was denied on July 29, 1987. App. A at 18a.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article IV:

"Section 3. New States may be admitted by the Congress into this Union; . . ."

Constitution of the United States, Amend. V:

". . . nor shall private property be taken for public use, without just compensation."

¹Appendices A through M are separately bound and will be cited as "App." Appendices 1-3 are reproduced in the back of this petition.

Northwest Ordinance, Act of July 3, 1787, 1 Stat. 50:

“Art. IV . . . The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.”

Act of May 29, 1848, 9 Stat. 233:

“*Be it enacted* . . . That the State of Wisconsin be, and is hereby, admitted to be one of the United States of America, and is hereby admitted into the Union on an equal footing with the original States, in all respects whatever”

Wis. Stat. §30.10(4)(b) (1985):

INTERPRETATION. . . .

(b) The boundaries of lands adjoining waters and the rights of the state and of individuals with respect to all such lands and waters shall be determined in conformity to the common law so far as applicable. . . .

Wis. Stat. §30.12(1) (1985):

GENERAL PROHIBITION. Except as provided under sub. (4), unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

STATEMENT OF THE CASE

Like *Cinque Bambini Partnership v. Mississippi*, 491 So.2d 508 (Miss. 1986), *cert. granted sub nom, Phillips Petroleum Co. v. Mississippi*, 55 U.S.L.W. 3504 (U.S. Jan. 20, 1987) (No. 86-870), this case raises a major federal question concerning the public trust doctrine — the proper method for determining the boundary of the public trust associated with a navigable body of water, here an inland lake. The State of Wisconsin has here asserted ownership under the public trust doctrine to lands, which are separated from a navigable lake by a marina, parking lot and road, which have been in private ownership since 1856, contain no navigable water, and which cannot be used for boating, fishing, hunting, travel, recreation, or any other public use, simply because water flowing across them drains into Lake Superior. Thus, Wisconsin, like Mississippi, has extended the public trust to include non-navigable, inland water courses draining into navigable waters.

In so doing, the Wisconsin Supreme Court adopted a “hydraulic connection” test — a test unrecognized by this or any other court at the time Wisconsin became a state — which completely departs from the common law governing ownership of the beds of water bodies. Further, the court deviated from accepted public trust jurisprudence by finding that land was part of a navigable lake at the time Wisconsin became a state even though the state only presented evidence of the land’s post-statehood condition. Relying on this Court’s holding that state law governs title questions after statehood, the court held that proof that land was “hydraulically connected” to a navigable lake and at a lower elevation than the lake is sufficient to establish not only that land had become part of a navigable lake after statehood but also that land was part of a navigable lake at statehood. Thus, in Wisconsin, federal law no longer determines what lands the state received in trust when it joined the Union. This unprincipled decision enormously expands Wisconsin’s public trust lands and will have a devastating impact on private land holdings, whose titles have been considered settled since 1848. Indeed, the trial judge, who found for the developers, commented on this prospect: “there is a lot of land, at least in Northern Wisconsin, that may be below the ordinary high water mark of a navigable stream or lake but is

separated therefrom by a hill or other barrier and could hardly be classified as a navigable water or part thereof.” App. C at 29a.

This petition, therefore, presents two previously undecided questions under the public trust doctrine: (1) to what extent may a state change its law solely to claim that land has become part of its public trust holdings after statehood and (2) whether the state may use a test unrecognized by this or any other court at the time it became a state or subsequently to justify its claim that lands were part of a navigable lake prior to statehood. Additionally, by applying the ebb and flow concept to an inland lake, the court’s opinion raises an issue of paramount significance to *Phillips Petroleum Co. v. Mississippi*: whether non-navigable streams and wetlands linked to a navigable lake were part of the public trust lands received by the inland states. Moreover, this case presents anew an effort of a state court to evade federal rights by making findings wholly without support in the record.

A. Proceedings in the lower state courts.

This public trust doctrine case concerns a parcel of land on Madeline Island, Wisconsin, which is being developed with a residential condominium project. Six housing units had been built before the state commenced this action. The land is separated from Lake Superior by a marina, parking lot, and road. Upland and uphill from the project site is a golf course, which drains approximately 1.3 million gallons of water per week across the site during the summer. The drainage water flows to the marina through a 15-inch culvert under the road. A picture of the site is on the following page.

Maps of the project site which lies entirely in Section 32, and the land between the site and the lake are reproduced in the back of this petition. Exhibit 42 (Appendix 1) is an historian’s manuscript map of a portion of the land between the site and Lake Superior. This map, using the contours existing in 1852 — four years after Wisconsin became a state — shows an inlet lying on Section 31, which was surrounded by marsh. Exhibit 30 (Appendix 2) shows the land between the project site and Lake Superior before the marina was constructed in 1964. A small boat basin and an open water slough lay on Section 31 and a road, running parallel to the

Golf Course

Marina

Old Fort Road

Lake Superior



Condominiums

shoreline on Section 31, crossed the boat basin and slough at their intersection. Neither the boat basin nor the slough reached the project site in Section 32. Exhibit 32 (Appendix 3) is a plat map of the marina project. The marina lies entirely on Section 31 and the road was relocated to the eastern boundary of the project site.

Prior to beginning construction of the condominiums in 1983, the developers met on the site, a portion of which is a wetland area, with representatives from the Wisconsin Department of Natural Resources and the United States Army Corps of Engineers and learned that using piles did not violate state or federal regulations applicable to the site. After they began constructing the condominiums on piles, the developers were informed that the site was in a floodplain, but obtained a variance from the county ordinance requiring structures to be built on fill. The state, which was represented at the variance meeting, failed to appeal the variance. After the developers had built six units, the state filed suit, alleging that the condominiums were built on the bed of Lake Superior and must be removed because they are obstructing navigation, a crime under Wisconsin law.² Wis. Stat. §30.12(1) (1985).

The state's theory was based on *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), which it cited for two propositions. First, the title the states received at statehood was absolute and could not be defeated by a subsequent federal patent. Second,

after statehood state common law doctrines, such as those relating to accretion, reliction, erosion and avulsion, apply with respect to riparian properties. Thus, it is not essential that a particular parcel of land now claimed as public lakebed have been part of the bed of a navigable water in 1848, if it since has become part of such a body of water under the state's common law.

²The state also contended that the variance was invalid. This issue is not before the Court.

App. D at 53a. In a footnote to this quoted material, the state asserted,

It is the state's contention that the land in dispute in this case has been part of the bed of Lake Superior at all times relevant to this proceeding and going back in time well before statehood. Strictly speaking, however, proof of the relationship of this land to Lake Superior in 1848 should not be regarded as a necessary element in establishing the state's claim to title to this property.

Id. at n. 18; *see also id.* at 58a. The state concluded, however, that proof under state law that the land had become part of the lake after statehood also satisfied its burden of proving that the land was part of the public trust when Wisconsin became a state. *Id.* at 54a. Thus, the developers' federal patent, issued after statehood, and the Swamp Land Act of 1855 were irrelevant because Wisconsin had indefeasible title:

Under the law of this nation and its states . . . it is clear that this patent could not operate to vest title to the lakebed in any entity other than the State of Wisconsin.

* * *

As of the date of statehood, Wisconsin's claim of title to the lakebed was no longer defeasible by any acts of Congress.

Id.

The state presented no evidence that the lake lay on the site at the time Wisconsin became a state; its proof that the wetlands are part of the lake was limited to the post-statehood condition of the land. Although the state cited the common law doctrines of accretion, reliction, erosion and avulsion, it presented no evidence that the land had become part of the lake under any of these doctrines. Rather, the state reasoned from two premises under Wisconsin law: first, land below the ordinary high water mark of a navigable lake is lake bed; second, if vegetation has obscured the

shoreline and no distinct mark caused by the action of the water may be found, "recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below the ordinary high-water mark." *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914).

The state surveyed the elevation of the ordinary high water mark of the lake and transferred the survey elevation across the marina, parking lot, and road to the condominium site. According to the state, all land below this survey elevation was lake bed because the property was "hydraulically connected" to the lake and water seeks its own level. The only definition offered for "hydraulic connection" (a term never before used in Wisconsin to describe publicly owned lake bed, *see* App. J at 113a-119a) was "connected by water;" thus, the eligible "connections" were the boat basin, the open water slough, wetlands, the marina, drainage water and the culvert. Although the state relied on "water seeking its own level" as proof that the lake flooded the land, it proved that the water flowed from the site to the lake: it offered evidence that the site drained an area of Madeline Island and would become a distinct lake if the flow of the water were blocked. App. I at 99a-100a. The only evidence that lake water, rather than drainage water from the golf course, came onto the property was one witness' statement that, on one particular occasion, he observed that wind blew lake water up the culvert. The state failed to present any evidence that the lake, rather than a "hydraulic connection," had ever crossed the intervening land to the project site. Moreover, the state did not produce any evidence that the project site was navigable in fact.

The defendants' theory below was that, while the state received title to the beds of navigable lakes in 1848, the federal government retained title to non-navigable swamps or marshes outside the boundaries of navigable lakes. They established that the condominium site was never a part of the lake by submitting the chain of title; maps drawn in 1852 and 1854, showing that the shoreline of Lake Superior was not on the project site; the plat maps of the intervening land showing that neither the lake nor any slough, creek, or stream reached the project site; and the testimony of an expert witness, a registered land surveyor, that the site has never been

lake bed. The developers challenged transferring the ordinary high water mark elevation from the shoreline of the lake to the property because the state's "hydraulic connection" theory was unauthorized by Wisconsin law.

The trial court found:

The project site is located on a spot where at least presently no one can boat on it; no one can fish on it; and there was no evidence submitted that anyone did or could hunt on it or travel on it for recreation as an incident to navigation. There was no evidence in the case that the public has any use for this land, let alone recreational, and none was claimed other than ownership, the purpose of ownership being unknown. App. C. at 29a.

The court also found that there was no ordinary high water mark on the property, and held that the state failed to prove that the project land is navigable.

The Wisconsin Court of Appeals reversed, rejecting the trial court's findings of fact. The appellate court reasoned that if the land were below the ordinary high water mark of the lake, navigability is irrelevant. Describing a state's witness as testifying that, "the project site was originally part of the basin, which was enlarged to become the present-day marina," the Court of Appeals found that the site was "naturally connected" to Lake Superior. The court concluded that those portions of the site that are below the ordinary high water mark of Lake Superior are parts of the lake's bed because they are hydraulically connected to the lake. The state's argument that it had proved the site was part of the lake at statehood was neither advanced in its appellate brief nor addressed by the Court of Appeals.

B. The opinion of the Wisconsin Supreme Court.

To address the Court of Appeals' error in reading the record, the developers attached copies of Exhibits 30 and 32 (App. 2 and 3) to their brief to show the Wisconsin Supreme Court that the

boat basin, which was enlarged to make the marina, lay on section 31, not on section 32 where the project site is located.

As to the appellate court's error of law, the developers argued that the term, "hydraulic connection," has no meaning in the common law, which classifies bodies of water³ and recognizes ownership of the beds based on the classification. They pointed out that the state has never claimed title under the public trust doctrine to land underlying non-navigable marsh outside the boundary of a navigable lake, tributaries of navigable lakes, or drainage water — the water bodies that link the site to the lake. Moreover, the developers argued that using a "hydraulic connection" test relieved the state of its burden of proving that the land was submerged by the lake. The state was required to show: the site was part of the continuous bed of the lake — that is, that all land between the site and the lake was at a lower elevation than the lake's ordinary high water mark; the source of the water was the lake, rather than the uplands; and the lake flooded the site for a sufficient amount of time to extinguish the private title derived from the federal patent. Additionally, the developers noted that the state could not rely on lake water blown through the culvert as proof that the lake flooded the land because there was no proof that the lake water had blown on the land before the marina and culvert were built. The state's reliance on a "hydraulic connection" that was created by governmental action is prohibited by this Court's holding in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (digging channel between ocean and private pond does not make the pond subject to the federal navigational servitude). The Wisconsin Supreme Court approved the transfer of the ordinary high water mark elevation to the subject property because of its "hydraulic connection" to the lake. Although the issue before the court was whether the "hydraulic connection" test was sufficient under state law to prove that the land had become part of the lake after statehood, the court refused to recognize the validity of the federal patent, granted eight years after Wisconsin became a state, because Wisconsin took title to the bed of Lake Superior at statehood. Additionally, the court

³For example: lake, stream, ground water.

rejected the trial court's findings and made two findings of its own: "As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is part of Lake Superior;" and "The Court of Appeals did not err in finding that the site is part of a basin naturally connected to Lake Superior." App. A at 5a and 11a.

In their motion for reconsideration, the developers specifically pointed out to the court that it could not evade a federal right by making findings that were wholly without support in the record or by applying novel state law. They stated, once again, that the state had the burden of proving that the lake, rather than a "hydraulic connection" flooded the defendants' land and that there was no evidence in the record to support findings that lake water would naturally flow to the site in the absence of an artificial barrier, or that either the boat basin or the open water slough (which was on the landward side of the road before it was relocated) were on Section 32. The evidence of a "hydraulic connection" before the marina was constructed merely established that, in the past, drainage water flowed across the site to the water courses on Section 31, which, in turn, drained into the lake. The motion for reconsideration was denied without comment.

C. This case is final under 28 U.S.C. §1257.

The Wisconsin Supreme Court's remand to the trial court to make specific findings as to those portions of the site below the ordinary high water mark does not preclude granting the writ sought in this petition.⁴ This Court will treat a decision on a federal issue as a final judgment for the purposes of 28 U.S.C. §1257, even though additional proceedings are anticipated in the lower state courts, if the highest state court has considered the federal question and no opportunity exists for its further consideration by the state courts; the parties seeking review in the Supreme Court could

⁴The case has also been remanded to the county body that granted the variance to the floodplain zoning ordinance. This remand, however, is of no significance to the lake bed issue.

prevail on the merits in the lower court proceedings on non-federal grounds, thus rendering unnecessary Supreme Court review of the federal issue; reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action; and a refusal to review the state court decision immediately might seriously erode federal policy. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1974). All of these tests are met in this case.

The federal questions in this case were fairly presented to the state courts and have been considered by the highest state court, the Wisconsin Supreme Court. In a public trust doctrine case there are two potential federal issues: whether the land was part of the public trust — that is, within the boundaries of a navigable body of water — at the time the state joined the Union; and, after statehood, whether state law has impaired the efficacy of federal grants or the use and enjoyment of the property of the grantee. *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Packer v. Bird*, 137 U.S. 661 (1891). In the Wisconsin Supreme Court, the issue was whether the “hydraulic connection” test improperly denied the developer’s title, derived from the federal patent, by relieving the state of its burden of proving that a navigable lake, rather than some other water, flooded the land after statehood. Thus, this federal issue was fairly presented to the Wisconsin Supreme Court. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The Wisconsin Supreme Court’s opinion, which was no mere error in reading the record, assails two federal rights: the court both evaded a federal right by making findings without support in the record and accepted the post-statehood “hydraulic connection” evidence as sufficient proof that the lake submerged the site at statehood. The rule of law established by the court’s decision is that evidence that water from the uplands drains across wetlands into a navigable lake and that the wetlands are at a lower elevation than the lake is sufficient to prove that they were within the boundary of the lake at statehood, no matter how far they are from the lake’s shoreline or that they are non-navigable. No further review of the Supreme Court’s holding is available in the Wisconsin courts.

On remand, the sole remaining issue under the lake bed question is whether the state has proved that portions of the site are below the ordinary high water mark. If the developers were to win on this state law ground, the federal issues would be mooted. Moreover, if this Court were to reverse the Wisconsin Supreme Court, further litigation of the lake bed issue would be precluded. Thus, the second and third factors of this test from *Cox Broadcasting* are present.

Finally, failure to review the Wisconsin Supreme Court's determination of the federal issues would seriously erode federal policy. That an important federal policy is at stake cannot be denied; two public trust issues in this case are currently before this Court in *Phillips Petroleum Co. v. Mississippi*. Indeed, the public trust doctrine, which was the subject of this Court's recent opinion in *Utah Div. of State Lands v. United States*, 107 S.Ct. 2318 (1987), has been described by this Court as an issue of "signal importance." *Corvallis*, 429 U.S. at 373.

REASONS FOR GRANTING THE WRIT

1. The issue whether the states took title under the public trust and equal footing doctrines to non-navigable, inland wetlands linked to navigable bodies of water by inland, non-navigable water courses is before this Court in *Phillips Petroleum Co. v. Mississippi*.

The boundary drawing problem presented in *Phillips Petroleum* is the inland reach of the Gulf of Mexico, a tidal body of water. Phillips Petroleum's land is traversed by non-navigable bayous, streams and ditches, which intersect the Gulf and in which the ebb and flow of the tide are discernable. Mississippi claimed title to all lands,

subject to the ebb and flow of the tide below the then *mean* high water level — regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the

water, regardless of how far inland and remote from the sea. 491 So.2d at 516-17 (emphasis in original).

To justify this claim, the Mississippi Supreme Court relied on the physical fact that navigable streams and channels may contain some non-navigable parts, particularly near the shoreline. Equating navigable tide waters with navigable fresh waters, the Mississippi court devised a “toothpick” test for determining the reach of the public trust:

...so long as by unbroken water course — when the level of the water is at mean high water mark — one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust. 491 So.2d at 515.

Under this test, Mississippi owns a portion of a non-navigable bayou and eleven non-navigable drainage ditches on Phillips Petroleum’s land, from the points where they intersect the Gulf to the inland reach of the tide.

Like the Mississippi Supreme Court, the Wisconsin Supreme Court has in this case relied on the physical fact that navigable bodies of water contain some non-navigable parts. Beginning with the rule that non-navigable wetland within the boundary of a navigable lake is publicly owned lake bed, the Wisconsin Supreme Court justified transferring the ordinary high water mark elevation of Lake Superior to the land because of its “hydraulic connection” to the lake. By tracing the public trust boundary up the “hydraulic connection” to the project site, the court was able to treat the land as if it were a non-navigable shoal near the shoreline with vegetation obscuring the erosion line, which normally marks the division between private upland and the lake.

Although no evidence of a “hydraulic connection” before statehood was presented, the Wisconsin Supreme Court held that the land passed to the state as part of Lake Superior at statehood.⁵ Under the equal footing doctrine, Wisconsin may regard “hydraulic connections” to a navigable lake as part of the public trust it received at statehood only if the original thirteen states did so. *Pollard’s Lessee v. Hagan*, 44 U.S. 212 (1845). Wisconsin’s re-definition of the lagoon, marsh, boat basin, open water slough, and drainage water as “hydraulic connections” and as parts of the lake is supported by neither the public trust doctrine, the equal footing doctrine, nor any opinion of this Court. At the time Wisconsin became a state, neither this Court nor any other court recognized “hydraulic connections” as parts of a navigable lake. Therefore, Wisconsin’s drawing of the trust boundary as it existed at statehood to include “hydraulic connections” to a navigable lake is invalid.

Stripped of the unsanctioned “hydraulic connections” language, this case raises the same issue as *Phillips Petroleum*: did the states take title under the public trust doctrine to non-navigable, inland wetlands linked to navigable bodies of water by non-navigable, inland water courses? *Phillips Petroleum* contends that both the English common law and the original thirteen states held that non-navigable inland waters were privately owned and urges this Court to reaffirm the holding of *Packer v. Bird*, 137 U.S. 661, 667 (1891): it is the water course’s susceptibility to use as a highway of commerce that sanctions the public right to ownership of the bed. Non-navigable inland streams, creeks, ditches and bayous are excluded from the public trust by the navigability in fact test.

⁵This portion of the petition addresses the questions raised by the court’s holding that the post-statehood “hydraulic connection” evidence was sufficient to prove that the site was part of the lake at statehood: whether the states took “hydraulic connections” to navigable lakes as part of their public trust lands and whether the public trust included non-navigable inland wetlands linked to navigable waters by inland, non-navigable water courses — an issue now before this court in *Phillips Petroleum*. Section 3 addresses the issue raised by using the “hydraulic connection” evidence to prove that the land became part of the lake after statehood.

Like the English and state courts which held that the beds of non-navigable inland waters are privately owned, this Court has long recognized private ownership of non-navigable wetlands adjacent to navigable waters. See, e.g., *Niles v. Cedar Point Club*, 175 U.S. 300 (1899) (marsh lying between dry land and Lake Erie, which drained the upland and was subject to inundation by the lake). Private ownership of wetlands that drain into navigable water was recently reaffirmed in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside*, this Court held that regulation of wetlands adjacent to navigable waters by the Army Corps of Engineers was not a taking without just compensation. Like the portion of the land in this case that is wetlands, the wetlands in *Riverside* abutted a navigable waterway and were "hydraulically connected" to that waterway, as that term is defined by the Wisconsin Supreme Court. This Court, however, recognized their private ownership.

Further, the "hydraulic connection" test, like the toothpick test, does not advance the public trust doctrine's purpose — preserving navigable waters as highways of commerce. The State of Wisconsin cannot seriously contend that these condominiums obstruct navigation in fact on Lake Superior. Moreover, the trial court found that the land is not susceptible of uses incident to navigation, such as boating, hunting, fishing or any other recreational use and specifically found: "There was no evidence in the case that the public has any use for this land, let alone recreational, and none was claimed other than ownership, the purpose of ownership being unknown." App. C at 29a. Indeed, had the state attempted to achieve its unstated purpose through regulation, rather than a bald assertion of title, the regulation would have been unconstitutional because the state failed to establish a public purpose. *Nollan v. California Coastal Comm'n*, _____ U.S. _____, 107 S. Ct. 3141 (1987).

Should this Court accept Phillips Petroleum's contention that the navigability in fact test excludes non-navigable inland water bodies from the public trust, the Wisconsin Supreme Court should be reversed. This petition, therefore, may be held pending the determination of this issue in *Phillips Petroleum*. This case, however, may be determined by a second issue raised in *Phillips Petroleum*:

whether the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable fresh waters.

2. The issue whether the legal boundaries of navigable tide waters are conceptionally and functionally the same as those for navigable fresh waters is before this Court in *Phillips Petroleum Co. v. Mississippi*.

The Mississippi Supreme Court, drawing an analogy between the mean high water level of tidal water and the ordinary high water mark of inland water, found their boundary tests to be identical. Holding that the boundary of tidal water extends inland to the reach of its tidal influence in non-navigable water, the Mississippi Supreme Court measured the extent of the public trust on these non-navigable waters by envisioning a toothpick sailing from the Gulf to the inland reach of its tides. This tidal influence — that is, its ebb and flow — can be measured in water courses by tidal gauges.

The toothpick test, by sailing a non-navigable inland water course as far as the tide can reach, extends the public trust far beyond the shore, the traditional focus of public trust controversy in tidal waters.⁶ *Phillips Petroleum* contends that because the original thirteen states did not take title to non-navigable inland streams, this test expands the territory Mississippi acquired at statehood. Mississippi, therefore, is on an unequal footing with both the original states and inland states. The Mississippi Supreme Court, recognizing the private ownership of shallow, non-navigable fresh water streams and their beds, acknowledges that claiming title to tidally influenced, non-navigable streams gives the State of Mississippi a greater share of public trust lands than that taken by inland states but argues that it is on an equal footing with the original states. 491 So.2d at 517. By adopting a “hydraulic connection” test and applying the ebb and flow concept to an inland lake, Wiscon-

⁶To raise revenue, the Stuart kings attempted to assert title to the strip of shore around the kingdom, which had been previously regarded as private property. H. Farnham, *The Law of Waters and Water Rights*, 180-91 (1904).

sin has taken title to non-navigable streams as parts of navigable lakes — territory equivalent to that claimed under the toothpick test. The Wisconsin Supreme Court's opinion, therefore, raises the issue of whether Mississippi is on an equal footing with Wisconsin and other inland states.

According to the Wisconsin Supreme Court, "hydraulic connection" means "connected by water." Like Mississippi's toothpick test, the "hydraulic connection" test has no requirement that this water connection be navigable in fact. Indeed, the state not only failed to prove that the water connection had ever been navigable but also included as a link in the "hydraulic connection" chain, non-navigable wetlands on Section 31. Thus, both states extend the public trust of a navigable body of water to include non-navigable, unbroken water courses flowing into the navigable water.

Like Mississippi, Wisconsin conflated concepts associated with coastal and inland waters; and this conflation has enormously expanded its public trust lands. Although the Court of Appeals did not use the term, the Wisconsin Supreme Court described that court as finding that the site was "subject to the ebb and flow of the lake." The Supreme Court held:

As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is part of Lake Superior." App. A at 15a.

The Wisconsin Supreme Court has overlooked the fact that inland lakes do not ebb and flow. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435 (1892). Unlike tidal waters, there is no measurable point of inland influence by a navigable lake. Because it has no limiting principle equivalent to ebb and flow, the "hydraulic connection" test claims title to all land at an elevation below the ordinary high water mark of a navigable lake and "hydraulically connected" to that lake. In fact, the trial court was troubled by this possibility: "there is a lot of land, at least in Northern Wisconsin, that may be below the ordinary high water mark of a navigable stream or lake but is separated therefrom by a hill or other barrier and could hardly be classified as a navigable water or part thereof." App. C at 29a.

Moreover, Mississippi's and Wisconsin's surveying the boundary lines of navigable waters to include connecting non-navigable water bodies departs from the boundary survey methods used when they became states. In *Knight v. United States Land Association*, 142 U.S. 161 (1891), this Court approved a survey method that recognized connecting bodies of water as distinct entities: when measuring the boundary of a body of water that is intersected by a smaller body of water, the boundary line is drawn across their junction, from headland to headland. *Id.* at 187, 207. As Justice Field explained in his concurrence,

the measurement of Chesapeake Bay does not include the Potomac River up to Washington because the tide is felt at the site of the capital.

* * *

Not only has this rule in the measurement of waters prevailed on the continent of Europe from the time of the Roman Empire, but it has been always accepted as controlling in England and in the United States, and never been, that I am aware, questioned except in the present case.

Id. at 207. Thus, at the time Mississippi and Wisconsin became states, accepted survey methods did not treat intersecting waters as parts of the larger body of water; rather, the water bodies were treated as separate entities.

When Wisconsin received title to the beds of navigable lakes, the boundaries of trust properties were the lakes' boundaries. The various bodies of non-navigable water flowing across the intervening and project land are intersecting smaller bodies of water, which, under both the common law and surveying practices in use when Wisconsin became a state, had separate legal identities and were not parts of the lake. The boundary of the lake, therefore, crossed their point of junction with Lake Superior, from headland to headland. Indeed, as part of their argument that the "hydraulic connection" test deviated from the common law, the petitioners argued to the Wisconsin Supreme Court that the drainage water on the site and the various water bodies on the intervening land

were separate legal entities. The survey elevation of the ordinary high water mark could not be transferred to them because they were not part of the same lake. *Diana Shooting Club*, 156 Wis. at 272, 145 N.W. at 820.

To determine whether Mississippi's toothpick test, which measures the public trust ownership of inland, non-navigable water courses as far as the tide can reach, gives Mississippi a greater share of public trust lands than those received by inland states, this Court must decide whether inland states received title to non-navigable streams and wetlands connected to navigable lakes. Neither the English common law nor the original thirteen states so held. This Court, therefore, should hold in *Phillips Petroleum* that Mississippi is on an unequal footing as a result of the Mississippi Supreme Court's decision: inland states did not take title under the public trust doctrine to inland, non-navigable water courses flowing into navigable lakes. This petition may be held pending the determination of this issue in *Phillips Petroleum*. Or, it may be granted so that the Court may hear the inland states' perspective on the conflation of inland and tidal concepts.

Should this Court determine in *Phillips Petroleum*, however, that the public trust of tidal waters includes non-navigable streams subject to the tide, this holding does not require affirmance of the Wisconsin Supreme Court. Even if the Court were to draw the boundary at the point of tidal influence, the "hydraulic connection" test would fall outside that boundary because inland waters are not subject to the tide. Further, applying the tidal ebb and flow concept to inland lakes results in a test with no limiting principle. This Court should grant certiorari to remove the clouds on title caused by adopting a "hydraulic connection" test without a limiting principle.

3. Wisconsin's abandonment of the common law governing the ownership of the beds of water bodies, redefinition of the public trust boundary of a navigable lake, and claim of title to land granted under a federal patent on the ground that it is inside the newly drawn boundary raises an issue of national concern.

The Wisconsin Supreme Court's acceptance of the "hydraulic connection" evidence as proof that the *lake* lay on the site after statehood raises a question left open in *State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). In *Corvallis*, this Court, reversing the holding of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), held that state law, rather than federal common law, governed the question whether a state retained title to lands that had re-emerged from the bed of a navigable stream. In holding that federal law determines the boundaries of the land acquired by a state at statehood but that the land is subject to state law thereafter, this Court relied in part on *Packer v. Bird*, 137 U.S. 661 (1891), 429 U.S. at 380. *Packer* stated a qualification to the rule adopted by the Court in *Corvallis*: the influence of state law is "subject to the condition that [state] rules do not impair the efficacy of the [federal] grants or the use and enjoyment of the property by the grantee." 137 U.S. at 669.

Prior to this case, Wisconsin used the common law classifications of water and formulated rules of law unique to each class. For example, the state owns the beds of navigable lakes and riparian owners hold qualified title to the beds of navigable streams, subject to the public's navigation rights, but have absolute title to the beds of non-navigable streams. Ownership of the beds, therefore, depends on whether the waters are classified as streams (flowing water) or lakes (still water) and whether they are navigable. *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 438 (1901). Indeed, this classification system can be traced not only to the English common law but also to the Code of Justinian. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and some Doctrines That Don't Hold Water*, 3 Fla. St. U.L.Rev. 511 (1975). Prior to this case, Wisconsin did not claim ownership to the beds of non-navigable bodies of water, such as wetlands outside the boundary of a navigable lake. See *Bilot*, 109 Wis. at 438 (marsh must be inside the natural shore of a lake to be considered lake bed). To invalidate title derived from a federal patent, the state was required to prove that the land was naturally a part of the lake, or an arm or bay of the lake, or some body of water having the incidents of a lake. *Id.* at 427. Additionally, to show that the land had become part of the lake, the state had to prove that the lake submerged the land for a sufficient amount

of time to extinguish the private title. See *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 371 373, 178 N.W. 569 (1928); *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436 (1899).

The adoption of a “hydraulic connection” test radically departs from this prior body of state law. The state is relieved of its burden of proving that the lake, an arm of the lake or some body of water having the incidents of a lake crossed the intervening land and flooded the project site for a sufficient amount of time to extinguish the private title. Rather, the state now simply treats as parts of a navigable lake inlets, marsh, boat basins, open water sloughs and drainage water flowing from the upland. Ignoring these water bodies’ legal status as separate entities — which the state itself proved by showing that the waters were flowing and that their source was the uplands rather than the lake — is crucial for the state’s new test: *Diana Shooting Club* only authorized the transfer of ordinary high water mark elevations to another point on the bank of the *same* lake. 156 Wis. at 272, 145 N.W. at 820. Moreover, the state is no longer required to prove that the site is part of the continuous bed of the lake — that is, that the land between the site and the lake is also at an elevation below the ordinary high water mark elevation. Relieving the state of its burden of proving *when* the lake flooded the site is critically important in this case. The only proof that lake water came on the land was one witness’ observation, made shortly before the state filed its case, that wind blew water through the culvert. This proof failed to establish that the lake submerged the land for a sufficient amount of time to extinguish the developers’ title. In fact, the culvert was built by the state and there was no showing that lake water came on the site before the culvert was built. As the evidence stands, therefore, the state made it possible for lake water to reach the site by building the culvert. Reliance on a “hydraulic connection” created by governmental action is a taking without just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Thus, the state not only had to show that the lake submerged the land for the requisite amount of time but also that lake water reached the site before the marina and culvert were built. It failed to present such proof.

This Court has long held that a state court cannot deny a federal right by basing its decision on state law grounds that have no fair or substantial support. *Ward v. Love County*, 253 U.S. 17,—22 (1919).

Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection involved be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded.

Demorest v. City Bank Co., 321 U.S. 36, 42 (1943). The decision in this case, departing entirely from established state law evades a federal right. *Cf.*, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). The “hydraulic connection” test overturns the common law system of classifying bodies of water by type and navigability to determine legal rights and relieves the state of its burden of proving that the lake (rather than a “hydraulic connection”) flooded the land for a sufficient amount of time to extinguish the private title. That this radical, unprecedented departure from a body of law rooted in Roman law upsets settled expectations is without doubt. This Court should grant certiorari to determine whether the states may radically change their law solely to claim land under the public trust doctrine.

4. The Wisconsin Supreme Court’s invalidation of a federal patent based on a record in which the state not only failed to prove that the land ever was submerged by a navigable lake but also expressly refused to meet any standard of proof previously recognized by Wisconsin or this Court should be reversed.

The state expressly declined to meet any standard of proof previously recognized by Wisconsin or this Court to establish that the site was submerged by a navigable lake (rather than a “hydraulic

connection") either when Wisconsin became a state or at any time thereafter. Evidence of a "hydraulic connection" is legally insufficient to prove the land is lake bed because no court recognized "hydraulic connections" as part of a navigable lake at the time Wisconsin joined the Union, and the test, which radically departs from state law, evades federal rights. Therefore, the sufficiency of the state's proof must be evaluated under prior state law: to defeat a federal patent, the state had to prove that before the construction of the marina, the site was covered by the waters of Lake Superior, or by an arm of the lake partaking of its character, or by some expanse of water governed by the law relating to the title to the beds of lakes and ponds, and that the premises in question were formerly a part of such submerged land before statehood. *Bilot*, 109 Wis. at 425. In addition, the state had to prove that the lake submerged the land after statehood for a sufficient amount of time to extinguish the private title. See *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 371-73, 178 N.W. 569, 573 (1928); *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436 (1899).

The Wisconsin Supreme Court found that "the source of the water on the property is not entirely clear." App. A at 6a. While acknowledging that 1.3 million gallons of water per week drain from the golf course across the site and that the site would flood if the culvert had not been built, the court noted: "Water also came through the culverts from Lake Superior when high winds arose." *Id.*

The state, however, presented no evidence that the lake, rather than a "hydraulic connection," ever submerged the land. The manuscript and plat maps, showing an inlet, boat basin and open water slough on Section 31, do not show the lake on the project site. Moreover, the state's proof was that the water flowed from the site to the lake: its witness testified that the site drained an area of Madeline Island and would become a distinct lake if the flow of the water were blocked. References in the record to open water on the landward side of Old Fort Road were to the open water slough on Section 31, which was on the road's landward side *before* the road was moved. Thus, there was no proof that lake water flowed up the inlet or boat basin, up the open water slough, and

up the wetlands on Section 31 to the wetlands on Section 32. To the contrary, the state proved that the water flowed in the opposite direction. Nor was there any proof that the boat basin, which was enlarged and is now the marina, was on the project site. Therefore, the Wisconsin Supreme Court's factual assumption — that lake water naturally flowed to the site in the absence of an artificial barrier and that the Court of Appeals did not err in finding that the site was part of basin that was enlarged to make the marina — are without any support in the record.

To the extent that it relied on lake water blown through the culverts, the Wisconsin Supreme Court refused to follow this Court's opinion in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *Kaiser Aetna*, this Court held that requiring public access to a pond, which was incapable of being used as a continuous highway for the purpose of navigation before a channel was dredged connecting the pond to the ocean, was a taking without just compensation. Exhibit 30 (Appendix 2) shows that neither the lake nor any slough, creek or stream reached the project site before the marina was built. Like the channel in *Kaiser Aetna*, the culvert is a man-made connection, linking a navigable body of water with privately owned land, previously separated from the navigable water by intervening land. The state could not rely on lake water occasionally blown up the culvert because there was no proof that lake water was blown on the developers' land before the culvert was built. The construction of the culvert linking the developers' land to the marina, therefore, is analagous to the dredging of the channel in *Kaiser Aetna*. The state cannot rely on a "hydraulic connection" created by governmental action to claim title to the developers' land.

This Court has held that a state court cannot evade federal constitutional rights by making erroneous findings of fact:

While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence.

Carlson v. Curtiss, 234 U.S. 103, 106 (1914). In their motion for reconsideration, which was rejected without comment, the developers pointed out that there was a failure of proof. The Wisconsin Supreme Court's decision not only is based on a record wholly devoid of any supporting evidence but also is made in the face of the State's express disavowal of meeting any standard of proof previously recognized by Wisconsin or this Court to establish that a navigable lake, rather than a "hydraulic connection," submerged the land. This Court should affirm the validity of federal patents, grant certiorari and reverse the Wisconsin Supreme Court.

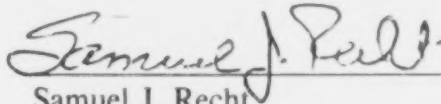
CONCLUSION

This petition may be held pending the decision in *Phillips Petroleum Co. v. Mississippi*. This petition, however, not only provides the Court with the opportunity to hear the inland states' perspective on the conflation of inland and tidal concepts but also poses issues of paramount significance to these states:

1. Whether inland states took "hydraulic connections" to navigable lakes as part of their public trust lands;
2. Whether the public trust included non-navigable, inland wetlands that drain into adjacent navigable lakes through non-navigable water courses;
3. Whether the states can radically change their law solely to claim land as part of their public trust holdings; and
4. Whether a state court can find that land is submerged by a navigable lake based on a record in which the state not only failed to prove this fact but also expressly refused to meet any standard of proof previously recognized by Wisconsin or this Court.

The opinion of the Wisconsin Supreme Court resolving these issues fails to follow holdings of this Court and departs not only from the common law but also from accepted public trust jurisprudence. Its unprecedented holding disrupts land titles, adopts a new test for proving whether land is part of the public trust, and applies this test both before and after statehood. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Samuel J. Recht", is written over a horizontal line.

Samuel J. Recht
(Counsel of Record)

David L. Petersen

Susan LaCava

Quarles & Brady

411 East Wisconsin Avenue

Milwaukee, WI 53202-4497

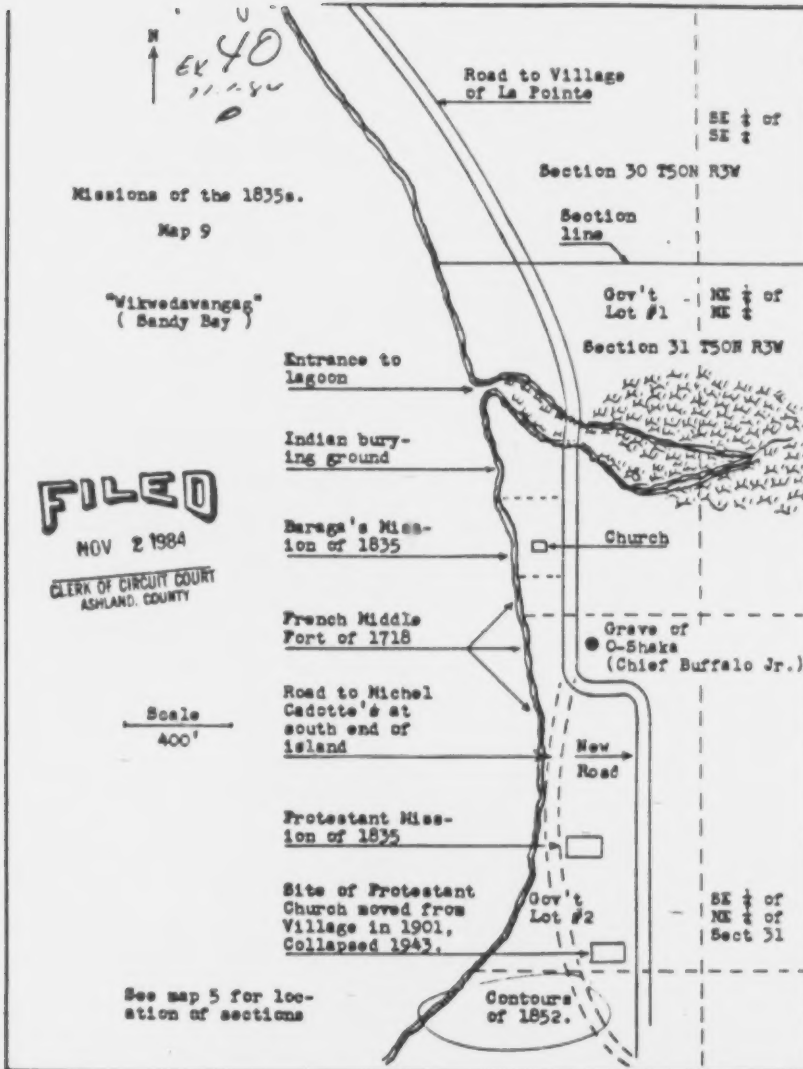
(414) 277-5000

Counsel for Petitioners

October 27, 1987

(X)

APPENDIX 1
(An Historian's Manuscript Map of the
Contours Existing in 1852)

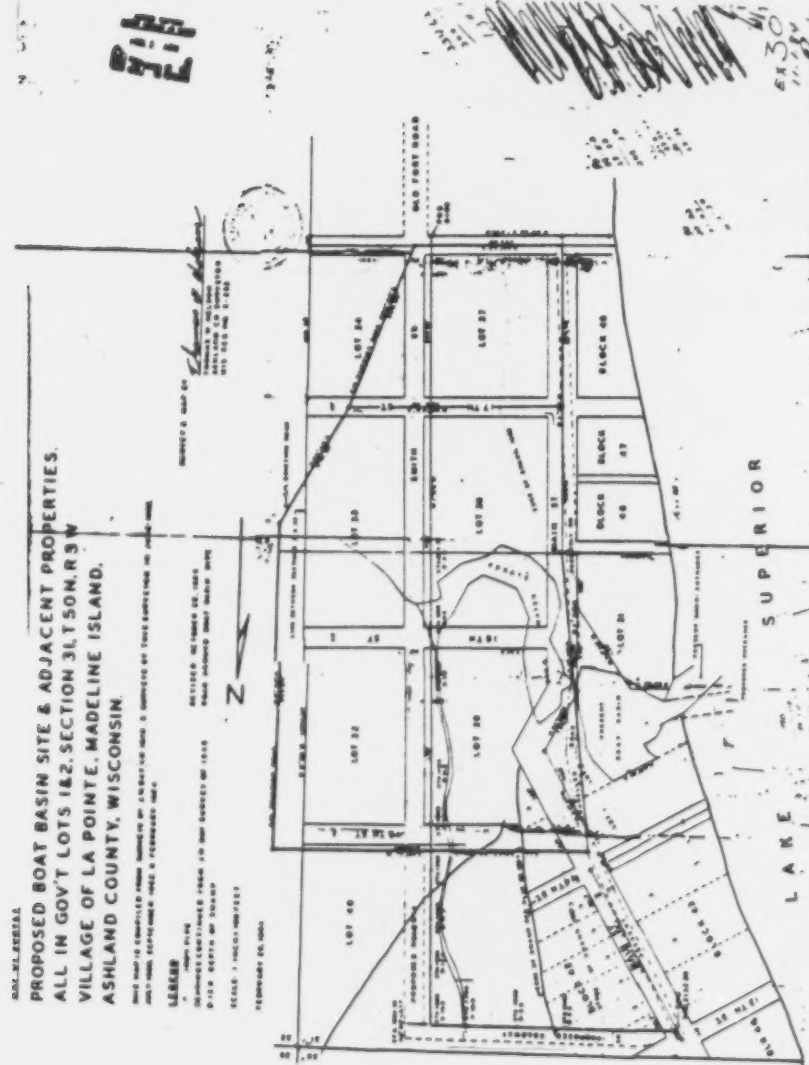


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(xi)

APPENDIX 2
(Plat Map of the Intervening Land Prior to 1964)



(xii)

APPENDIX 3
(Plat Map of the Site and Marina)



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